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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 14, 2001

FILE NO. 028082-0001

BY HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: WT Dkt. No. 01-74/Comments of Leap Wireless International, Inc.

Dear Ms. Salas:

Enclosed herewith are the original and four copies of the Comments of Leap Wireless International, Inc. in the above-referenced docket. Please stamp and return the enclosed additional copy. If you have any questions, please call me.

Very truly yours,



Patrick H. Shannon
of LATHAM & WATKINS

Enclosures

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MAY 14 2001

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Reallocation and Service Rules for
the 698-746 MHz Spectrum Band
(Television Channels 52-59)

GN Docket No. 01-74

To: The Commission

COMMENTS OF LEAP WIRELESS INTERNATIONAL, INC.

Leap Wireless International, Inc., on behalf of itself and its affiliates and subsidiaries (collectively, "Leap"), hereby offers these initial comments in the above-captioned proceeding.¹ Leap supports the reallocation of 698-746 MHz spectrum (the "Spectrum") for commercial wireless uses and agrees with the Commission's tentative conclusion that it should adopt a geographic area licensing approach to assign licenses in the Spectrum. However, the reallocation of the Spectrum will be meaningless to Leap and other smaller carriers and to the consumers in the types of markets that Leap serves if the Commission decides to license and auction the Spectrum in nationwide or large regional geographic areas such as Economic Area Groupings ("EAGs"). To that end, Leap urges the Commission to instead license and auction *all* of the Spectrum in smaller, more appropriately-sized Basic Trading Area ("BTA") or Metropolitan Statistical Area ("MSA")/Rural Service Area ("RSA") basis.

¹ Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Notice of Proposed Rule Making*, GN docket No. 01-74, FCC 01-91 (Rel. March 28, 2001) ("NPRM").

I. DISCUSSION

A. Spectrum Licensing and Auction in Smaller Geographic Areas Would Enhance Important Congressional And Commission Objectives

Section 309(j) of the Communications Act required the Commission to promulgate rules to ensure “prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.”² Section 309(j) also includes as objectives for competitive bidding, the avoidance of “excessive concentration of licenses and ... disseminating licenses among a wide variety of applicants”³ Moreover, section 706(a) of the Telecommunications Act of 1996 directed the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to *all* Americans.”⁴ The Commission has recently recognized that access to advanced telecommunications services in a reasonable and timely basis is often difficult for Americans who are remote from major populations centers. Based on this recognition, the Commission indicated that it would be proactive in promoting advanced service for these Americans “by encouraging competition, promoting infrastructure investment and addressing the affordability of advanced services.”⁵ If the Commission determines to license and auction the Spectrum on the basis of nationwide or large regional service areas, the Commission would, for the reasons set forth below, effectively preclude many Americans from receiving the advanced telecommunications services that would

² Section 309(j)(4)(B) of the Communications Act, as amended, 47 U.S.C. § 309(j)(4)(B).

³ Section 309(j)(3)(B) of the Communications Act, as amended, 47 U.S.C. § 309(j)(3)(B).

⁴ Section 706(a) of the Telecommunications Act of 1996 (emphasis added).

⁵ In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, FCC No. 00-290 (rel. August 21, 2000).

be possible through the use of the Spectrum, and significantly limit competition and consumer choice in the wireless market. Such a result would be contrary to the above-stated objectives.

Leap currently offers advanced and innovative wireless services in many otherwise underserved small- to mid-sized “secondary” markets and is eager to acquire the spectrum it needs to deploy its services in as many such markets as possible. Nevertheless, in the event that the Commission determines to license and auction the Spectrum on a nationwide or large regional geographic basis, Leap and other innovative but small carriers would be effectively prevented from acquiring any of the Spectrum. Licenses with national or large regional service areas would be both incompatible with the business plans of Leap and other smaller carriers, and far too costly to acquire at auction. The mega-carriers will likely be the only entities able to afford and acquire such licenses. However, due to their perception that secondary markets have less potential for wireless growth and are not as lucrative as more densely populated urban areas, the nationally or regionally footprinted mega-carriers have little interest in providing innovative service plans or advanced telecommunications services in such markets.

As history has aptly demonstrated, upon acquiring the licenses for the Spectrum, the mega-carriers will ignore secondary and rural markets and focus instead on the large urban population centers. Such a result would preclude many Americans in secondary and rural markets from receiving the kinds of advanced wireless telecommunications services made possible by the Spectrum. As an additional matter and as discussed below, large carrier licensees of the Spectrum cannot be counted on to partition or disaggregate the licenses in the post-auction market. In that event, licensing of the Spectrum in large service areas will effectively result in

the warehousing of the Spectrum by large carrier purchasers – a result with is contrary to Congress’s stated objectives.

In order to avoid this outcome, the Commission should license and auction all of the Spectrum in smaller sized geographic areas such as MSAs/RSAs or other geographic areas that are similar in size and number to BTAs. Licensing the Spectrum in MSA/RSA- or BTA-sized service areas is appropriate because such service areas are both large enough to make the aggregation of multiple license practicable for the larger carriers that desire national or large regional footprints, and small enough to allow Leap and other smaller niche and landline-competitive providers to be able to afford to acquire Spectrum licenses at auction. If the Spectrum is licensed on a MSA/RSA or BTA basis, those carriers interested in the most densely populated and lucrative markets could acquire those markets without preventing other smaller carriers from providing advanced telecommunications services serving secondary and rural markets.

B. Certain Portions of the 700 MHz Band Will Soon be Exclusively Available to Larger Carriers on an EAG Basis

Spectrum in the 700 MHz band has excellent propagation and characteristics and is ideal for next generation mobile other advanced telecommunications services. The Commission has previously ordered that licenses in the 747-762 MHz and 777-792 MHz band (the “Upper 700 MHz Band”) will be licensed and auctioned in six, immense, EAGs.⁶ This will allow the mega-carriers to purchase Upper 700 MHz Band licenses covering large geographic areas at auction in September 2001. Due to the immense costs associated with purchasing and building out licenses with such large services areas, however, Leap and other small carriers most

⁶ Service Rules for the 746-762 MHz and 777-792 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, *First Report and Order*, WT Docket No. 99-168, FCC 00-5, at ¶ 56 (Rel. January 7, 2000) (“Upper 700 MHz Order”).

likely will be precluded from purchasing Upper 700 MHz Band spectrum at auction. In order to offer providers such as Leap with a fair opportunity to purchase some portion of the 700 MHz spectrum and to encourage the most rapid deployment of advanced services in secondary and rural as well as densely populated urban markets, the Commission should make the lower part of the 700 MHz band available in smaller service areas.

C. The Commission Should Not Depend on Licensees' Ability to Partition or Disaggregate Licenses with Large Service Areas as a Means for Distribution of the Spectrum to Smaller Service Providers

In the Upper 700 MHz Order, the Commission suggested that to the extent that licensing on an EAG basis would deny some entities the opportunity to purchase spectrum, the Commission's rules that allow for post-auction partitioning would make spectrum available to entities in the post-auction spectrum market.⁷ Similarly in the NPRM, the Commission concluded tentatively that because some licensees require smaller service areas, post-auction partitioning of the Spectrum would be permitted with respect to the Spectrum as well.⁸ While Leap is in favor of allowing spectrum partitioning generally, to the extent that the Commission views it as a viable alternative to the licensing of the Spectrum using smaller service areas, Leap disagrees.

Partitioning is not a viable substitute for licensing based on MSA/RSA- or BTA-sized service areas. Historically, Leap and other smaller service providers have had only very limited success in purchasing partitioned licenses from mega-carriers in the post-auction market. This is because there is little incentive generally for the holders of licenses with large service

⁷ *Id.* at ¶ 57.

⁸ NRPM, at footnote 122.

areas to partition those licenses given alleged spectrum capacity needs of these carriers,⁹ and even less incentive to partition the licenses to carriers such as Leap, which offer significant price competition to mega-carrier margins.

In addition, Commission rules intended to motivate licensees of large service areas to serve secondary and rural markets or to partition or disaggregate such licenses will likely prove ineffective. Such rules require licensees to provide services to a specified percentage of the population in their licensed service area by certain dates (“Build-out Requirements”). If the Build-out Requirements are not met, licensees face the revocation of their license. Nevertheless, the Build-out Requirements will provide little motivation to licensees of large service areas to serve secondary and rural markets or to partition or disaggregate such licenses. By focusing their services on lucrative urban population centers alone, licensees of large service areas most likely would be able to achieve the population coverage required by the Build-out Requirements. This would allow such licensees to ignore the secondary and rural markets covered by the license and, without partitioning or disaggregating the license, avoid the prospect of license revocation.

D. Licensing of the Spectrum on a MSA/RSA or BTA Basis Would Likely Introduce Efficiencies and Incentives that Would Expedite Incumbent Broadcaster Migration to DTV and Full Use of the Spectrum Licenses by New Licensees

The Spectrum is currently used as channels 52-59 by a great number of incumbent broadcasters. Incumbent broadcasters’ continued use of the Spectrum may significantly delay the time when new licensees have uncompromised use of the Spectrum. Under the statutory provision for digital television (“DTV”) conversion, these broadcasters may continue to

⁹ See generally, 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, WT Docket No. 01-14, Comments of Verizon Wireless (filed April 13, 2001); Comments of Cingular Wireless, LLC (filed April 13, 2001); Comments of AT&T Wireless Services, Inc. (filed April 13, 2001). See also, generally, Comments of the Cellular Telecommunications & Internet Association (filed April 13, 2001) (“CTIA Comments”).

broadcast on their current channel allotments until at least December 31, 2006.¹⁰ In establishing rules that will facilitate the migration of incumbent broadcasters from the Spectrum, it should be noted that the broadcast licenses held by the incumbent broadcasters correspond in service area size much more closely to MSAs/RSAs and BTAs than they do to EAGs.

Should the Commission determine to license the Spectrum on the basis of EAGs or similarly large service areas, each new licensee will need to negotiate agreements with a significant number of incumbent broadcasters in order to make use of the licensed Spectrum to its full extent. If the Spectrum is licensed and auctioned on an MSA/RSA or BTA basis, however, the similarity in service area size and the greater number of new licensees able to purchase licenses will likely introduce significant efficiencies and incentives for new licensees to reach voluntary agreements with incumbent broadcasters migrating incumbent broadcasters to DTV. This would allow new licensees to provide services to their entire licensed area on an expedited basis and would have the additional benefit of accelerating broadcaster conversion to DTV.

II. CONCLUSION

Leap supports the Commission's proposed reallocation of the Spectrum and welcomes the potential opportunity to use the Spectrum to enhance services in Leap's current markets and to bring its innovative and advanced telecommunications services to new secondary and rural markets throughout the country. However, as set forth in the comments above, if the Commission determines to license and auction the Spectrum on the basis of national or large regional service areas, the opportunity for Leap and others smaller carriers to deploy advanced services using the Spectrum will be precluded. In order to promote directives of the

¹⁰ See 47 U.S.C. § 309(j)(14)(A).

Communications Act and the Commission's own objectives, the Commission should license and auction all of the Spectrum in smaller sized geographic service areas such as MSAs/RSAs or other service areas that are similar in size and number to BTAs. This approach will enable the carriers of all sizes and with diverse business plans to purchase and put the Spectrum to use, and will encourage competition and the rapid deployment of advanced telecommunications capability to *all* Americans including those in secondary or rural markets.

Respectfully submitted,

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By:  _____
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Dated: May 14, 2001